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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. [redacted]/16

WILLIAM J. ROPER,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

CONTINENTAL GRAIN COMPANY,

Respondent-Impleaded

and

JOHN W. McGRATH CORPORATION and ARROW STEAMSHIP AGENCY, INC., t/a ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATION,

Respondent-Impleaded, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner William J. Roper, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in Case

No. 7986, entered therein on August 30, 1960. This Judgment affirmed a Final Judgment of the United States District Court for the Eastern District of Virginia at Norfolk, dismissing Petitioner's Libel in Admiralty.

I. OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 282 F 2d ..... under the style of William J. Roper, Libellant-Appellant versus United States of America, Respondent-Appellee, et als. This Opinion is copied in the Appendix to this Petition on page 1, together with the dissenting Opinion of The Honorable Simon E. Sobeloff Chief Judge of the Court.

II. JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on August 30th, 1960. The Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. (1)

III. QUESTION PRESENTED

1. The petitioner Roper, a longshoreman gang foreman was injured at Norfolk, Virginia, when a steel strap holding a block on a grain chute from which a line was running to a detachable scoop or grain plow collecting grain from the bottom of the hold of the vessel HARRY LANE broke, striking Roper in his face. The HARRY LANE was owned by the Government and had been used to store grain while at its ship anchorage in the James River. The grain was sold by the Government to Continental Grain Company and the Government had the vessel towed in navigable waters down the James River

and through the Chesapeake Bay to discharge the grain to a grain elevator while the vessel was lying in navigable waters at the Norfolk Grain Elevator Pier. The Government had never relinquished its control over the vessel to anyone, but had maintained a Master and crew aboard to aid in navigation for the voyage and during unloading operations. The vessel was engaged in a purely commercial transaction at the time Roper was injured. The grain was discharged by lowering a grain chute through which an endless belt ran from the elevator into the holds of the ship carrying the grain up from the hold into the elevator at the pier. The grain chute had a detachable scoop or plow which was being used in the hold by longshoreman Roper, to which was attached a line running through a block on the end of the marine leg or grain chute which pulled the scoop over the bottom of the hold towards the mouth of the chute scooping up grain residue thereon. The District Court held that the vessel was withdrawn from navigation at the time Roper was injured and did not owe Roper the warranty of seaworthiness. The two Judge majority of three of the Court of Appeals for the Fourth Circuit affirmed, with the Chief Judge dissenting.

The ultimate question presented by the decision of the Court of Appeals is whether or not a shipowner owes a longshoreman the warranty of seaworthiness for a vessel formerly deactivated and withdrawn from navigation when the longshoreman is injured after the vessel is placed into navigation for commercial purposes, without relinquishing control of the vessel to anyone but discharging her cargo while lying in navigable water, although her motive power was "moth-balled" at the time.

2. The subsidiary question involved along with the determination of the ultimate question is whether or not

the shipowner owes the warranty of seaworthiness for equipment attached to shore on one end but resting aboard ship on the other end and used by the vessel in unloading and discharging the vessel's cargo.

IV. STATEMENT

Roper, a longshoreman, filed his libel against the United States as owner of the vessel HARRY LANE pursuant to Title 46, U. S. C. A., Sec. 741 et. seq., known as the Suits in Admiralty Act, for his personal injuries sustained. Previously the HARRY LANE stored with a cargo of Government grain had been laid up in the James River Anchorage, her motive power "mothballed" and withdrawn from navigation . The Commodity Credit Corporation sold the grain to the Continental Grain Company which in turn contracted with Roper's employer, Atlantic and Gulf Stevedores for stevedore services to discharge the grain to Continental's Grain Elevator at Norfolk. For the voyage from the James River Anchorage to Norfolk, approximately 20 miles, the Government employed a Master with licenses unlimited for all oceans together with a crew of six to assist in navigation of the vessel while being towed by a tug to Norfolk, down the navigable waters of the James River through the Chesapeake Bay to the Norfolk Grain Pier. The voyage was made without incident and the vessel was made fast to the pier. A grain chute or marine leg, the universal modern method of discharging grain was used, one end of which was attached to the elevator and the other end laid into the hold of the ship through which an endless belt ran carrying the grain up into the elevator. Since July, 1956 the Government had unloaded 28 of its grain ships with this equipment at Norfolk. At the end of the chute a detachable scoop or plow was provided to which a line ran through a block

held by a steel strap, this scoop being detached and let out, thereafter being pulled by the leg's machinery scooping the residue of grain on the bottom of the hold to the mouth of the leg. While using the detachable scoop scraping the bottom of the ship's hold, the steel strap holding the block broke, striking Roper in the face. The block was admittedly worn out, defective and unsafe allowing it's wobbling sheave to cut the strap as a result of which the block flew off. The Master admitted it was his duty to look out for safety on the ship. He duly noted Roper's injuries in the ship's log book. The duties of the Master and seamen required them to tend the ship's lines, place lights and aid in the navigation of the vessel. The Master stated that Roper while assisting in the discharge of the grain was doing "one of the things that historically was the job of seamen up until the eighteenth century." The vessel was at her dock in navigable waters solely for the purpose of a commercial transaction, discharging her cargo and in no sense were any repairs being done or any other activities except discharging cargo. The Government retained complete control over the vessel at all times during the unloading, the ship's crew tending lines and other duties. There was no contention below of relinquishment of control.

The Master admitted that no inspection whatsoever was ever made of the grain discharging equipment, the grain scoop or the blocks or machinery of the marine leg. Roper's employer, Atlantic and Gulf Stevedores, had brought the marine leg and grain discharging equipment aboard the vessel solely to perform their stevedoring services in unloading the same. The District Court held it was clear that the vessel was engaged in a commercial venture lying in navigable waters with Roper performing longshore duties and otherwise entitled to the warranty of sea-

worthiness but nevertheless held that the United States had withdrawn the vessel from navigation and by applying West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L.Ed. 2d 161, the warranty is not owed Roper. A majority of two of a three Judge Court of Appeals affirmed holding that West was applicable, with the Chief Judge dissenting, contending that West was inapplicable and that the warranty extended to Roper, pointing out a plain conflict in principle with the West decision of this Court and with the decision of the Second Circuit in Lawlor vs. Socony Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960), cert. den. 363 U. S. 844.

V. REASONS FOR GRANTING THE WRIT

1. There is a clear and direct conflict in principle between the decision of the Court of Appeals in this action and the decision of the Supreme Court of the United States in West v. United States, 361 U. S. 118, 80 S. Ct. 189, 4 L.Ed. 2d 161 and with the Second Circuit's decision of Lawlor vs. Socony Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844. In West v. United States supra, the Government's vessel previously deactivated in the mothball fleet in the James River was towed to the shipyard at Philadelphia and turned over to it for the purposes of overhauling and reactivation, complete control over the vessel being relinquished to the shipyard. West, a shoreside employee of a repair subcontractor was injured during the reactivation work. This Court held that the voyage to Philadelphia was for the specific purpose of delivering the vessel to the shipyard contractor to render her seaworthy, the Government turning over complete control of the vessel to the shipyard for such repair purposes and the warranty of seaworthiness was not owed. Further it was held that the complete over-

haul repairs were not ship's work and as such required the vessel to be turned over to the shipyard in order to render her seaworthy. This Court held that the focus should be upon the status of the ship at the time, the pattern of repairs and the work to be done to determine whether the warranty of seaworthiness applied to an injured shore-based worker.

The status of the vessel HARRY LANE here has no similarity whatsoever to the status of the MARY AUSTIN in the West decision, as is pointed out by Chief Judge Sobeloff in his dissent below.

Mr. Justice Clark in rendering the Opinion of this Court in West stated on pages 164, 165 of 4 L. Ed. 2d:

> "On the other hand, the vessels involved in the cases depended upon by petitioners[2] were, at the time of the injury, in the hands and under the control of the owner or charterer and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to a voyage. **** But no such situation is present here. The Mary Austin, as anyone could see, was not in maritime service. She was undergoing major repairs and complete renovation, as the petitioner knew. Furthermore, he took his orders from the contractor, not the shipowner. He knew who was in control. This undertaking was not "ship's work" but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. ****It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive

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Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208, 34 S. Ct. 733, 51 LRA NS 1157, (1914); International Stevedoring Co. v. Haverty, 272 US 50, 71 L ed 157, 47 S. Ct. 19 (1926); Pope & Talbot Inc. v. Hawn, 346 US 406, 98 L ed 143, 74 S. Ct. 202 (1953); Alaska S. S. Co. v. Petterson, 347 US 396, 98 L ed 798, 74 S. Ct. 601 (1954); Crumady v. The Joachim Hendrik Fisser, 358 US 423, 3 L ed 2d 413, 79 S. Ct. 445, (1959).

nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen are doing on shipboard at the moment of injury.***"

Chief Judge Sobeloff in his dissent below lays his finger on the error of the majority in petitioner's case stating:

"This was no dead ship. The sterotype does not fit and will not survive analysis. A phrase, apt enough to describe an inert vessel undergoing major repairs in a shipyard, is completely misapplied to one in course of discharging cargo – cargo which she has just transported many miles for delivery precisely as any other cargo carrier might do.

It does not matter that before making the journey the vessel was inactive, or that she might thereafter again resume inactivity. We find her fully active on the day with which we are concerned. Unlike a repair-worker called in to make a vessel fit for service, as in West v. United States, 361 U. S. 118, (1959), this plaintiff came aboard to perform a task rightly called traditional for seamen. Due to a failure of the equipment, he met with injury while thus engaged. Does this not meet the law's every requirement for a recovery on the ground of the vessel's unseaworthiness? I think it does, and recovery should not be denied because of the ship's status before the voyage in question or its expected later status. There is nothing logically inconsistent or legally incongruous in saying that the actual conditions at the time of the accident control, not the past or future."

We believe that it is clear that the decision of the Court of Appeals in this case is wrong and that there is a direct and clear conflict in principle between that decision and the decision of this Court in West, supra.

In the Second Circuit decision of Lawlor vs. Socony

Vacuum Oil Co., 275 F. 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844, the vessel was brought to the shipyard for its annual inspection and overhauling and shoreside worker Lawlor came aboard and was injured by a defective ladder. The Court stated on page 604 of 275 F. 2d:

> "We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision of this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (Lyon v. United States, 2 Cir., (1959), 265 F 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (Berge, supra), nor a wholly deactivated vessel from the "mothball fleet" (West, supra), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul."

The Second Circuit held that the warranty of seaworthiness extended to Lawlor as there was no measurable loss of control over the vessel by the owner, the character of the work was incidental repairs and such as usually done by seamen and further the continued presence of the crew aboard performing their customary work. This Court denied certiorari on this decision in 363 US 844.

We think it clear that the decision of the Court of Appeals below is in direct conflict in principle with that of

the Second Circuit in Lawlor, supra, and that the decision in this case is plainly wrong.

2. The subsidiary question involved with the determination of the ultimate question is whether or not the shipowner owes the warranty of seaworthiness for equipment attached to shore on one end but resting aboard ship on the other end and used by the vessel in unloading and discharging the vessel's cargo.

The majority in the decision below while holding that the warranty of seaworthiness was not owing to Roper yet they agreed with the District Court's dicta that the United States as owner did not warrant the soundness of the marine leg and its appliances which were shore attached but which were also ship attached and used for discharging cargo. This Court has recently held that the warranty of seaworthiness to an injured shoreside worker extended to cover shorebased equipment. The Tungus v. Skovgaard, 358 US 588 (1959); Rogers v. United States Lines, 347 US 984. (1954) and Pope & Talbot vs. Hawn, 346 US 406 (1953).

VI. SUMMARY AND CONCLUSION

It is respectfully stated that the decision of the Court of Appeals for the Fourth Circuit in petitioner's case is in clear, direct and substantial conflict in principle with the decision of this Court in West v. United States, 361 US 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 and further conflicts in principle with the Second Circuit decision in Lawlor v. Socony Vacuum Oil Company, 275 F 2d 599, (2d Cir. 1960) cert. den. 363 U. S. 844, making it of utmost importance that this Court review the decision of the Court of Appeals in petitioner's case as the same tends to

create uncertainty as to the rights of all similar litigants, further tending to confuse the issues as to the extension of the warranty of seaworthiness in similar cases. In addition the lower Court decision is plainly wrong.

Wherefore, petitioner respectfully prays that this Petition be granted and that a Writ of Certiorari issue, and that this Honorable Court review and determine petitioner's rights herein and that the decision of the Court of Appeals may be reversed.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7986

William J. Roper, Libellant,
Appellant,

versus

United States of America, Respondent-Petitioner;
Continental Grain Company, Respondent-Impleaded,
Petitioner; and John W. McGrath Corporation and
Arrow Steamship Agency, Inc., t/a Atlantic and
Gulf Grain Stevedoring Association,
Respondent-Impleaded,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued January 7, 1960. Decided August 30, 1960.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Sidney H. Kelsey for Appellant, and Carl C. Davis and Alan Raywid, Attorneys, Department of Justice, (George Cochran Doub, Assistant Attorney General.

Joseph S. Bambacus, United States Attorney, and Samuel D. Slade, Attorney, Department of Justice, on brief) for Appellee, United States of America.

HAYNSWORTH, Circuit Judge:

The foreman of a gang of stevedores was injured when there was a rupture of a block on machinery attached to a grain elevator, but partially lowered into the hold of a deactivated vessel owned by the United States. Under the Suits in Admiralty Act[1] he filed a libel against the United States. This action resulted in the usual petition to implead the granary, with which the United States had contracted for the unloading of the vessel, and a further petition by the granary to implead the stevedore, the employer of the injured man, with which it had contracted for the incidental stevedoring work. The District Court dismissed the libel after finding that the United States was not negligent and had not warranted that the machinery of the granary was "seaworthy."

The principal question is whether the owner of a deactivated vessel warrants to a stevedore employed by a granary the condition of the granary's unloading machinery. We agree with the District Court that it does not.

The Harry Lane, a Liberty ship owned by the United States, was deactivated in 1945. Her supplies, stores, and nautical instruments were removed. Her boilers, engines and pipes were drained, flushed with preservatives or filled with grease. The tail shaft and propeller were locked and

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[1] 46 USCA § 741 et seq.

the rudder fixed amidship. Her cargo gear and tackle were stripped, her winches drained and the packing removed from the pistons. Her Coast Guard Certificate of Inspection was lifted and the biannual Coast Guard inspection suspended. She was then relegated to the James River Reserve Fleet, a "moth ball fleet." She could not be operated again as a commercial vessel without a major overhaul and relicensing and recertification.

There she remained until the price support program for wheat resulted in such surpluses that the storage facilities for grains were taxed. She, with a number of other "moth-balled" vessels, was then pressed into service as a floating warehouse. She was modified to provide additional ventilation to her holds to protect the grain which was expected to be stored there for a long period.

In June 1954, the Harry Lane was towed to the Norfolk & Western grain elevator at Norfolk, loaded with surplus grain and returned to the Reserve Fleet. She remained there until September 1956, when she was again towed to the Norfolk & Western grain elevator for the purpose of discharging the grain she had taken on more than two years earlier.

This use of the vessel was under a general storage agreement between Continental Grain Company, the lessee of the Norfolk & Western grain elevator, and Commodity Credit Corporation supplemented by specific agreements for the utilization of the storage space in deactivated vessels of the Reserve Fleet. Continental, in turn, had a contract with Atlantic and Gulf Grain Stevedoring Associates pursuant to which Atlantic and Gulf supplied the necessary stevedoring services.

Norfolk & Western's elevator was equipped with a "Marine leg," a device for unloading grains. It is a large piece of equipment, permanently affixed to the elevator and to the dock. It is incapable of lateral movement, but, when a ship is properly placed beneath it, the mouth of the leg may be lowered into the hold unit it is in contact with the grain. The marine leg is, basically, a housing containing a system of endless-belt, grain-carrying conveyers. These conveyers elevate the grain through the leg and carry it horizontally into the elevator.

When the grain has been removed to the point that the mouth of the leg is on the bottom of the hold and the elevation of the grain in the corners and remote areas of the hold has been so reduced that the grain no longer flows to the leg, it is necessary to bring such remaining grain to the leg and its elevating machinery. For this purpose, the leg is equipped with four plows or grain shovels. Each of these plows is connected, through a bridle, to a line which runs through a block attached to a pad eye at one of the corners of the leg, near the mouth, and thence, through other blocks to one of several small drum winches, high in the leg but controlled by the longshoremen in the hold by means of a clutch line.

The procedure is for a longshoreman to walk the plow away from the leg and place it in any desired location. When the plow has been placed, the drum winch is engaged through the clutch line. As the drum takes up the plowline, it draws the plow, and the grain in front of it, back to the leg.

On the day of his injury, Roper was supervising a crew of stevedores operating the grain plows. He undertook to

demonstrate to one of them a more efficient use of the plow. During the course of this demonstration, after the drum winch had been engaged and while the plowline was in tension, a strap holding the plowline block near the mouth of the leg broke, and the block flew into Roper's face.

Subsequent examination of the block disclosed the fact that its bushing had become worn, allowing the sheave to wobble and to contact the strap. The turnings of the sheave cut into the strap until the strap failed.

The block was unsafe for use, but the defect was not apparent upon a visual inspection of the assembled block. Indeed, Roper testified that one of his duties was to inspect the marine leg and its equipment prior to each use of it and that he had inspected it on the day that he was injured. The defect would have been apparent if the block had been disassembled. The disassembly of one block would not have been a complicated operation nor of long duration. If there was a duty to disassemble this block for inspection purposes, however the duty would require the disassembly and minute inspection of all of the blocks, tackle and equipment used in association with the marine leg, perhaps the conveying machinery of the leg itself.

Under these circumstances, we think there is ample support for the finding that there was no showing of negligence on the part of the United States. It had engaged the expert operator of the machinery to do the work and it, in turn, had engaged the expert stevedores, who regularly worked with the machine, to perform the stevedoring service. The duty of care by the owner of a live ship to make her safe for the work to be done would hardly require it to make such a minute inspection of shore-based machinery not in its control as would have been required to disclose

the defect here. When the United States engaged competent people to do the work in which they were specialists, it was not required to verify for itself the effectiveness of the expert's maintenance of his specialized equipment.

The more important question is whether the United States, as owner of this deactivated vessel, warranted to the stevedore the soundness of the marine leg and its appliances. The District Court did not consider whether the usual warranty of seaworthiness would encompass this sort of shore-based, shore-attached equipment,[a] for it held there was no warranty of seaworthiness. Since we agree, we also confine ourselves to the holding that there was here no warranty of the seaworthiness of any unloading equipment.

It is now settled that a deactivated vessel in one of the "moth ball" fleets is, for these purposes, dead and withdrawn from navigation, so that there is no warranty of her seaworthiness.[a] Generally, the warranty of seaworthiness would not arise again until the vessel had been put through a major overhaul and she and her appliances and rigging had been reconditioned, restored and recertified.

In West, as here, the vessel was a deactivated Liberty ship which had been in the moth ball fleet at Norfolk. She was towed from Norfolk to Philadelphia and there delivered to a ship yard for the purpose of being reconditioned and reactivated. She had aboard several men who

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[a] See United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541. McKnight v. N. M. Paterson & Sons, Limited, D.C.N.D.Ohio, 181 F. Supp. 434.

[a] West v. United States, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed. 2d 161; see also Latus v. United States, 2 Cir., 277 F. 2d 265 (decided April 11, 1960); Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

became her principal officers when she was recommissioned, but, though in the general employ of the owner, they had not signed on the vessel when, during the course of the reconditioning work, West was injured. These men had the right to inspect the work on behalf of the United States, but no right to control or supervise it. So here, the riding master had no authority to control or supervise the unloading operation, for his duties were limited to protection of the vessel from such hazards as fire and pilferage.[4]

In deciding that there was no warranty of seaworthiness, the Supreme Court in West assumed that the injured man may have been doing seamen's work. It held there was no warranty to anyone, whatever the nature of the particular work he was doing, because the vessel affirmatively represented that she was not sound or fit for sea and the work was controlled by the shipyard. Here the ship affirmatively represented that her unloading equipment was not sound or fit for use and the work being done was controlled by the elevator, not by the ship or her owner

Roper seeks to avoid the thrust of West by contending that the Harry Lane was returned to navigation when she was placed in service as a floating warehouse and moved from the Reserve Fleet to the grain elevator. He

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[4] To accomplish the movement of the vessel from the Reserve Fleet to the elevator, the custodial agent sent aboard a riding master and six seamen, but the seamen did not sign on the vessel. They took with them six mooring lines, a heaving line, fire hose, a boardingladder, safety lamps, a sounding rod, a lead line and several electric light clusters. The seamen handled the mooring lines at the Reserve Fleet anchorage and at the elevator, but were then dismissed. The riding master remained employed to see that the ship was properly moored and kept clean, that the seals on her storerooms were not broken and that fire hazards were not created. He was not berthed or messed aboard. Indeed, he was not in command of the actual movement of the vessel, that having been under the control of the pilot captain of one of the two tug boats that moved the vessel.

argues that she was actually "carrying" cargo, that the movement was in furtherance of a commercial transaction and that she should be treated as if she had been reactivated and returned to service.

Of course, the United States was under a duty to exercise care to see that such things as the vessel's hatch covers and ladders, with which the stevedores must necessarily work, were reasonably safe for use. Should we ignore the fact that the vessel had no crew and carry Roper's contentions to their extremities, we could, at most, find a warranty that the ship, itself, her hatch covers and ladders were safe for their intended use.[6] No such limited use could give rise to a warranty of seaworthiness of unloading equipment, all of which was still in "moth balls" or completely removed.

Petterson v. Alaska Steamship Co.[6] and Rogers v. United States Lines[7] extended a live ship's warranty of her unloading equipment and gear to similar appliances brought aboard by the stevedore and used with the actual or implied permission of the ship. In such situations it is appropriate that the protection of the warranty not depend upon technicalities of title. Those cases in no way suggest, however, that a dead vessel which does not warrant its own equipment, and no one supposed it did, nevertheless warrants the machinery of a granary simply because it is used to unload the vessel. It is not the fact that an unloading operation is being performed which gives rise to the war-

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[6] See, however, Hawn v. American S.S. Co., 2 Cir., 107 F 2d 999; Kissinger v. United States, D.C.E.D.N.Y., 176 F. Supp. 828.

[6] 9 Cir., 205 F. 2d 478, affirmed sub nom. Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798.

[7] 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120.

ranty, but the fact that the vessel in service ordinarily represents she is sound and complete in her gear and equipment. There was no such representation here, for the vessel clearly represented itself as being entirely without operable equipment and usable gear. The ship which has no equipment or gear to warrant, does not warrant to others the soundness of machinery they may bring aboard.

We conclude that the owner of this dead vessel did not warrant to Roper the soundness of the granary's machinery.

Affirmed.

SOBELOFF, Chief Judge, dissenting:

The incontestable fact in this action by the longshoreman Roper against the S/S "Harry Lane" is that recovery is denied for injuries resulting from a defect in equipment actively in use in discharging cargo.

It is insisted, first, that there was no negligence in failing to inspect the gear. It is said that the burden of such inspection would be excessive and is therefore not required. There is no need to analyze this reasoning, for the point is immaterial, if the warranty of seaworthiness extends to this situation.

On the second branch of the case, based on the claimed warranty of seaworthiness, the majority concludes, in accordance with the shipown'er contention, that this was a "dead ship," which owed the plaintiff no such obligation.

"This was no dead ship. The sterotype does not fit and will not survive analysis. A phrase, apt enough to describe an inert vessel undergoing major repairs in a shipyard, is completely misapplied to one in course of discharging cargo —cargo which she has just transported many miles for delivery precisely as any other cargo carrier might do.[1]

It does not matter that before making the journey the vessel was inactive, or that she might thereafter again resume inactivity. We find her fully active on the day with which we are concerned. Unlike a repair-worker called in to make a vessel fit for service, as in *West* v. *United States*, 361 U.S. 118 (1959), this plaintiff came aboard to perform a task rightly called traditional for seamen. Due to a failure of the equipment, he met with injury while thus engaged. Does this not meet the law's every requirement for a recovery on the ground of the vessel's unseaworthiness? I think it does, and recovery should not be denied because of the ship's status before the voyage in question or its expected later status. There is nothing logically inconsistent or legally incongruous in saying that the actual conditions at the time of the accident control, not the past or future."

The only similarity between the *West* case and this is that in each the ship had been for a time in the moth ball fleet. After this common point is established all resemblance between the two cases disappears. In *West* the vessel was delivered to a shipyard for major repairs and complete overhaul, without reservation of control or supervision over the work. In *West* there was no cargo aboard nor was any contemplated. She was in every real sense withdrawn com-

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[1] In the record the journey is described variously as "upstream" and "downstream," but it was stated at the oral argument that the vessel traversed a distance of more than twenty miles from the "mothball" fleet to the grain elevator.

pletely from service. Here, however, the ship was taken from the moth ball fleet and put into service as a carrier to deliver grain to an elevator at a considerable distance. This is the outstanding feature of our case and gives the "Harry Lane" its distinctive status as a carrier of cargo. Roper sustained injuries while assisting in the actual discharge of that cargo. As this is a seaman's traditional work, he is entitled to the benefit of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953); *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954); *Rogers* v. *United States*, 347 U.S. 984 (1954); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959).[2]

When the vessel in the *West* case was withdrawn from the moth ball fleet, if instead of being turned over to a contractor for "complete overhaul," it had been used to carry cargo to a distant point and the plaintiff met with injury while assisting in the unloading, I have no doubt the Supreme Court would have permitted recovery.[3]

Totally irrelevant is the meticulous description of the earlier removal of engines, etc. Reducing a fully equipped ocean-going vessel to the condition of a barge does not alter the case here, since on the occasion under inquiry the vessel had been towed, like a barge, with a load of grain and was in process of delivery when the gear failed. Barges

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[2] With all deference to the opinion in *Hawn* v. *American S/S Co.*, 107 F.2d 499, (2nd Cir., 1939), it provides no authoritative guide. It was decided before *Sieracki* and the series of cases developing its doctrine.

[3] *Lawlor* v. *Socony-Vacuum Oil Company*, 275 F.2d 599 (2nd Cir., 1960), points out the limits of the *West* doctrine. It holds that a ship in the yard for annual overhaul merely, as distinguished from major repairs, warrants to those working upon it that it is seaworthy. The instant case involves not even annual overhaul or any work which may be said to take it out of navigation.

are not exempt from the obligation of seaworthiness. A vessel is defined in 1 U.S.C.A. section 3 as follows:

> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

See also: *Ex Parte Easton*, 95 U.S. 68 (1877) (a barge is a vessel such that there can arise a maritime lien for wharfage, enforceable by a District Court sitting in admiralty); *Ellis* v. *United States*, 206 U.S. 246 (1907) (holding that scows and floating dredges are vessels, and that the men working on them are seamen); *Goett* v. *Union Carbide Corp.*, 361 U.S. 340 (1960) (a barge is a vessel to which the warranty of seaworthiness may be applicable); *Jeffrey* v. *Henderson Bros.*, 193 F. 2d 589 (4th Cir., 1951); *Summerlin* v. *Massman Const. Co.*, 199 F. 2d 715 (4th Cir., 1952).

Calling a cargo-carrying vessel a "floating warehouse" does not distinguish it from other water carriers or alter its obligations under maritime law for defects resulting in injury to those handling its cargo. So, in a sense, may any cargo-bearing vessel be called a "floating warehouse" while en route. Whatever the "Harry Lane's" status may have been while idle and with a cargo aboard, her status as a vessel in navigation became clear when she proceeded to deliver the grain to the elevator more than twenty miles away. She was then not significantly different from any vessel that had never been in the moth ball fleet.

It is suggested that the vessel had no crew, but this vessel had a crew of six under a riding master while en route. The question of "signing on" is of no importance

under these circumstances. The statutes relating to signing on, even if applicable, are for the benefit and protection of the seamen and have never been deemed to limit the scope of the term "seamen."

Moreover, even if the seamen aboard the vessel during its journey would, for some reason, not be considered a crew, this would be immaterial. The absence of a regular crew may be significant in the case of a ship undergoing repair, as in *West*, for it then may be a factor in determining whether the ship has been withdrawn from navigation. However, our ship was unquestionably in navigation, being actually used as a barge, and transporting a cargo. As previously pointed out, barges, with no men aboard during the journey, but with motive power furnished by a tug, are vessels in navigation whose seaworthiness is warranted. The men aboard the tug constitute the crew responsible for the barge.

If, upon completion of the voyage, the crew, whether travelling aboard the vessel itself or on the tug which has it in tow, withdraws and the longshoremen take over to make effective the purpose of the voyage by unloading the goods, these men stand in the shoes of the seamen and are accorded the rights pertaining to seamen. Starting with *International Stevedoring* v. *Haverty*, 272 U.S. 50 (1926), through *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), to *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959), this principle has been recognized and maintained both in the interpretation of the general maritime law and in the construction of statutes enacted for the benefit of seamen generally. The point is no longer debatable.

From the erroneous assumption that the vessel was a "dead ship" owing no warranty of seaworthiness, the United States as owner proceeds to the next erroneous assertion—a pure *non sequitur*—that the vessel in any event warranted nothing beyond her own equipment. This contention, however, was put to rest by the Supreme Court in *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396 (1954), where stevedore's tackle brought aboard was held appurtenant to the ship when used in the ship's service.

The Government also asserts that the marine leg, an endless belt extending into the bowel of the ship and lifting grain, is not to be considered a part of the ship's equipment, because it was land-based. The fallacy of this proposition is exposed by the holding in *Rogers* v. *United States Lines*, 347 U.S. 984 (1954), where the shipowner was held liable for the unseaworthiness of the stevedore's land fall runner used to augment the ship's gear. Also, in *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959), the defective equipment was shore-attached. There, a cargo of oil was being discharged from the vessel, and the company engaged for this purpose used its own pump and hoses to bring the oil ashore. This land-based equipment becoming defective, causing oil to spill on the deck, the plaintiff went aboard to make repairs. He slipped on the oil and fell to his death. The Supreme Court upheld the lower court's holding that he was protected by the warranty of seaworthiness. See also *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), where the detailed facts as to the injury itself are not revealed, but where apparently a similar situation was present.

It seems to me immaterial that the marine leg was attached at the top to the grain elevator on the pier. Its lower

end extended into the ship's hold and was actually gather ing the grain for discharge. The dominant fact is that it was equipment presently used in unloading. While it seems to me unnecessary to establish which part of the marine leg failed, it may be noted in passing that the part that broke and caused the injury was a strap holding a block attached to a scoop then collecting grain from the bottom of the hold and making it available to the conveyor belt.

Furthermore, since the vessel had no equipment of her own there is even less reason than ordinarily to relieve her of the established obligation to arrange for seaworthy equipment to handle cargo. If a vessel which has a full complement of gear of her own is not excused for faliure of equipment brought aboard by the stevedore as in *Petterson, a fortiori* she is no less vulnerable when by failure to provide equipment of her own she must rely on that supplied by others. The fact that the United States employed the grain company, which in turn employed the stevedore to preform the unloading, is immaterial. The obligation of the United States was non-delegable. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); *Crumady* v. *The J. H. Fisser*, 358 U.S. 423 (1959); and it was absolute, *Mitchell* v. *Trawler Racer Inc.*, 362 U.S. 539 (1960).

To summarize, Roper was aboard an active, not a dead vessel. To complete her journey it was necessary to unload the cargo of grain. While engaged in this traditional seamen's work Roper sustained injury due to faulty equipment assigned to his use. Under these circumstances, the Supreme Court has made it clear that one in the position of this plaintiff is entitled to indemnity from the vessel's owner. Therefore, I would reverse.